STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B057

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES TOOTHAKER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DIVISION OF ADULT PAROLE SUPERVISION,

Respondent.

Hearing commenced on January 15, 1997 and concluded on March 21, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Assistant Attorney General Diane Marie Michaud. Complainant appeared and was represented by Carol Iten, Attorney at Law.

Respondent's witnesses were Investigators Michael Disque and Kenneth Lovin, Department of Corrections, and Tom Coogan, Division Director of Adult Parole Services, Department of Corrections.

Complainant testified in his own behalf and called no other witnesses.

Respondent's Exhibits 1 through 6 were stipulated into evidence. Exhibit 7 was admitted without objection.

Complainant offered no exhibits.

MATTER APPEALED

Complainant appeals a five-day disciplinary suspension. For the reasons set forth below, respondent's action is rescinded.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

3. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant, James Toothaker, was a Correctional Technician (Sergeant) at the Fremont Correctional Facility (FCF) at the time of the incident described herein. He has since been promoted to the rank of Lieutenant. He was a member of the Special Operations Response Team (SORT) from 1988 until 1992.

2. Toothaker has been employed by the Department of Corrections (DOC) for nine years and has received primarily commendable job performance ratings. He has been issued no other corrective or disciplinary actions.

3. In September 1996, DOC Investigator Mike Disque telephoned Toothaker at FCF and asked him to come to the central office in Colorado Springs for an interview in connection with the investigation of a SORT "shakedown" at Centennial Correctional Facility in the early 1990s. There had been allegations of theft of guns and ammunition, drug use and other crimes by SORT members, of whom there were 25 to 30. The investigator did not suspect Toothaker of wrongdoing but felt that he might have valuable information to offer. Toothaker was known as a "straight-up guy."

4. On Monday, September 30, 1996, Toothaker arrived at the central office accompanied by AFSCME Business Agent Robert Roybal, serving as Toothaker's representative. In addition to Investigator Disque, Investigator Ken Lovin was present.

5. Toothaker had a tape recorder in his possession and asked that he be allowed to tape the interview. He stated that he wanted to have a verbatim transcript for his own protection because he believed that DOC investigators tended to twist things around and that three other SORT members had been unjustly fired.

6. Disque denied Toothaker's request, explaining that he and Lovin would take notes, and that Toothaker and Roybal could also take notes, thus alleviating the need for a verbatim transcript. (Disque testified at hearing that the advantage of taking written notes is that certain matters can be left out.) Toothaker explained that he would answer all questions fully and truthfully as long as he were allowed to tape record the interview. Disque refused and, at the conclusion of the would-be interview, advised Toothaker of his *Gerraghty* rights on a form which was signed by all four persons present. *Gerraghty* stands for the proposition that an

employee's statements during an investigation cannot be used against him in a criminal prosecution but may be used against him in an administrative proceeding.

7. Disque would not allow the interview to be audiotaped because he assumed that Toothaker would share the tape with his friends at SORT and because there might be several different issues discussed which should not all be lumped together on the same tape.

8. As a lead investigator, Disque has not allowed the tape recording of an interview during his three years at DOC. However, he has sat in on interviews by other lead investigators who allowed the interview to be taped.

9. In September or October 1996, Investigator Lovin interviewed Lt. Steve Hartley, a SORT member, and granted Hartley's request to tape record the interview. Lovin testified that this was in the course of a review, not an investigation, that there were no privacy issues and at the conclusion of the interview Hartley said Lovin could keep the tape, which he did.

10. The unwritten DOC policy with respect to audiotaped interviews is that the decision is left to the discretion of the lead investigator. The investigator decides whether to allow the taping on an interview. Disque testified that he could have granted Toothaker's request and there would have been nothing wrong with him doing that. The policy also requires that, if either party tapes an interview, a copy of the tape must be made available to the other party.

11. There are ten or twelve investigators within the office of the DOC Inspector General. It appears that they do not talk to each other about their particular practices.

12. The investigation into the Centennial "shakedown" has been completed.

13. Executive Director Zavaras delegated appointing authority to Tom Coogan, Director of the Division of Adult Parole Services, for the purpose of conducting an R8-3-3 meeting addressing Toothaker's refusal to answer questions during an official investigation. Coogan is not Toothaker's supervisor and did not have prior knowledge of the incident.

14. The R8-3-3 meeting was held on October 15, 1996 at Coogan's office in Lakewood. In attendance were Coogan, Assistant Attorney General Tom Parchman, Toothaker and Robert Roybal. Toothaker advised Coogan that he would have provided information if he had been allowed to tape record the interview. Coogan, who did not, himself, know what the policy was, later contacted Inspector General Bob Cantwell to learn that DOC policy leaves it to the discretion of the investigator in determining whether an interview

will be audiotaped. Cantwell also confirmed that Lt. Hartley was interviewed on audiotape but distinguished Hartley's interview by telling Coogan that it was in connection with a different investigation.

15. Coogan checked Toothaker's job performance record and found him to have been a very satisfactory employee over the past several years. Coogan decided to impose a five-day disciplinary suspension because of the seriousness of the charge, concluding that the tape recording of the interview was a moot point because Toothaker had a representative with him, and this would prevent things from being twisted around. In view of a good performance record, Coogan determined that Toothaker "was worth salvaging in terms of continued employment."

16. Coogan did not think that a corrective action was appropriate because it still was not clear whether Toothaker would give a statement.

17. By letter dated November 1, 1996, Coogan imposed a five-day disciplinary suspension for violation of DOC Administrative Regulations 1450-1 and 1150-4 having to do with staff being required to cooperate during an official investigation. Coogan found Toothaker's conduct to be a willful failure to cooperate with investigators. (Exhibit 2.)

18. Complainant filed a timely appeal of the disciplinary action on November 12, 1996.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994).

Respondent submits that the real issue in this case is whether complainant should have been allowed to tape record the interview. To this judge, that is not the issue. In rendering this decision, the administrative law judge takes no position on the propriety of tape recording investigative interviews, a matter best left to the expertise of the agency.

This case is about the impropriety of disciplining an employee based upon a vague policy, which might have more than one meaning depending upon whom is asked. *See generally, Wilder v. Board of Education of Jefferson County School District R-1*, Colorado Court of Appeals Case No. 96CA0709, 26 *The Colorado Lawyer* 182 (March 1997) (teacher dismissal reversed for vagueness of policy concerning the showing of controversial films in classroom).

Complainant was not put on fair notice that his insistence on tape recording the interview would constitute a refusal to answer questions or a failure to cooperate with investigators. Such terms are not adequately defined in the subject administrative regulations, but rather depend upon an interpretation. In complainant's view, he did not refuse to cooperate. He stated from the outset that he would answer all questions to the best of his ability if he were allowed to tape record the interview. One investigator might grant that request, while another might not. Disque, himself, testified that he would not have been doing anything wrong by allowing the interview to be audiotaped.

Complainant was entitled to prior notice that his conduct was proscribed. Whatever an agency determines its policy to be, the policy must be clear, understandable and consistently applied before it can serve as the basis for discipline.

One way to provide the required notice before discipline was to issue a corrective action and warning of future consequences in the event of noncompliance, giving complainant specific notice that his conduct would be considered a refusal to cooperate with investigators in violation of DOC Administrative Regulations 1450-1 and 1150-4. The appointing authority instead decided against a corrective action on grounds that it was still not clear to him that complainant intended to give a statement. Yet, that is the very *purpose* of a corrective action, *i.e.* to correct and improve an employee's performance or behavior in a formal, systematic manner. Rule R8-3-2, 4 Code Colo. Reg. 801-1. This is the approach that a reasonable and prudent administrator would have taken under the circumstances. As it stands, complainant was disciplined, and no statement was ever received from him.

In addition to it being the action of a reasonable administrator, the appointing authority was *required* to impose progressive discipline. Rule R8-3-1, 4 Code Colo. Reg. 801-1. There is no evidence of record that complainant was progressively disciplined. This record cannot sustain a finding that complainant's conduct was "so flagrant or serious" as to warrant immediate disciplinary action. *Id*. (Indeed, he has since been promoted.) Consequently, disciplinary action was not within the realm of alternatives available to the appointing authority.

Because of the vagueness of whether complainant did, in fact, refuse to answer questions during an investigation, respondent's action is found groundless. The appointing authority's disregard of the rule of progressive discipline is found to be an act of bad faith. Complainant should, therefore, receive an award of his reasonable attorney fees and costs under §24-50-125.5, C.R.S. of the State Personnel System Act. *Coffey v. Colorado School of Mines*, 870 P.2d 608 (Colo. App. 1993), *cert. denied*; *Hartley v. Department of Corrections,* Colorado Court of Appeals Case No. 96CA0183, ___ P.2d ___ (April 17, 1997).

CONCLUSIONS OF LAW

1. Respondent did not prove by preponderant evidence that complainant committed the acts for which discipline was imposed.

2. The discipline imposed was not within the range of alternatives available to the appointing authority.

3. Respondent's action was arbitrary, capricious or contrary to rule or law.

4. Complainant is entitled to an award of attorney fees and costs.

ORDER

The action of the respondent is rescinded. Complainant shall be reinstated for the period of the disciplinary suspension with back pay and benefits. Respondent shall pay to complainant his reasonable attorney fees and costs incurred.

DATED this _____ day of April, 1997, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol M. Iten
Attorney at Law
789 Sherman Street, #640
Denver, CO 80203

and in the interagency mail, addressed as follows:

Diane Marie Michaud
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